

## Αρχές σύναψης συμβολαίων για χρήση ηλεκτρονικών προϊόντων

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### *Περίληψη*

Οι νόμοι περί προστασίας πνευματικής ιδιοκτησίας έχουν προβλέψεις για την αναπαραγωγή πνευματικών έργων/υλικού στα πανεπιστήμια και στις βιβλιοθήκες για ερευνητικούς και διδακτικούς σκοπούς με ειδικές ρυθμίσεις και διατάξεις που αφορούν τις βιβλιοθήκες και που προβλέπουν την αναγκαιότητα της "δίκαιης χρήσης" (χρήσης που γίνεται για κοινωφελής σκοπούς και που δεν επηρεάζει σημαντικά το κέρδος του συγγραφέα). Με τις τεχνολογικές εξελίξεις που κάνουν εξαιρετικά εύκολη την αναπαραγωγή των πληροφοριών, οι ιδιοκτήτες πνευματικών έργων πιστεύουν ότι δεν καλύπτονται από τις υπάρχουσες διατάξεις περί προστασίας αυτών των έργων. Σε διεθνές επίπεδο, μια πληθώρα διεθνών συνθηκών καθώς και Ευρωπαϊκών οδηγιών έχουν διαπραγματευθεί - συνθήκες που ουσιαστικά ενισχύουν τα μέτρα προστασίας των πνευματικών έργων.

Ταυτόχρονα, οι βιβλιοθήκες συνάπτουν συμβόλαια για πρόσβαση σε ηλεκτρονικά προϊόντα. Οι λεγόμενες άδειες πρόσβασης χρήσης ηλεκτρονικών προϊόντων συχνά καταστρατηγούν τις αρχές της "δίκαιης χρήσης" και τις ειδικές νομικές προβλέψεις για αναπαραγωγή του πνευματικού έργου που διαχειρίζονται οι βιβλιοθήκες. Έτσι μέσο της σύναψης συμβολαίων, οι βιβλιοθήκες συχνά αποποιούνται των δικαιωμάτων του και συχνά επιβαρύνονται με επιπλέον νομικές υποχρεώσεις. Επομένως χρειάζεται μεγάλη προσοχή όταν διαπραγματευόμαστε συμβόλαια χρήσης ηλεκτρονικών προϊόντων. Οι βιβλιοθήκες χρειάζεται να προστατεύουν τις ανάγκες των χρηστών τους και να μην αποποιούνται των δικαιωμάτων τους. Σε τελική ανάλυση, η σωστή ισορροπία

μεταξύ των δικαιωμάτων των ιδιοκτητών και των χρηστών των πνευματικών έργων είναι ο μόνος τρόπος που εξασφαλίζει την συνεχή δημιουργία πνευματικών αγαθών, αλλά ταυτόχρονα και τη συνεχή ευημερία μιας κοινωνίας με την ευρεία χρήση και διάδοση των πνευματικών αγαθών.

Οι βιβλιοθηκονομικές ενώσεις των ΗΠΑ έχουν διακηρύξει τις αρχές πάνω στις οποίες πρέπει να βασίζεται η σύναψη συμβολαίων χρήσης ηλεκτρονικών προϊόντων, θα εξετάσουμε τις βασικές αρχές διαχείρισης πνευματικών έργων και θα παρουσιάσουμε το έργο που επιτελούν οργανισμοί όπως η Ένωση Ερευνητικών Βιβλιοθηκών (Association of Research Libraries), η Αμερικανική Ένωση Βιβλιοθηκονόμων (American Library Association), κτλ., καθώς και ο Διεθνής Συνασπισμός Βιβλιοθηκονομικών Κοινοπραξιών (International Coalition of Library Consortia).

**ΛΕΞΕΙΣ ΚΛΕΙΔΙΑ:** ακαδημαϊκές βιβλιοθήκες, διεθνείς εξελίξεις, πνευματική ιδιοκτησία, αρχές σύναψης συμβολαίων, ηλεκτρονικά προϊόντα, βιβλιοθηκονομικοί σύλλογοι, Ένωση Ερευνητικών Βιβλιοθηκών (ARL), Διεθνής Συνασπισμός Βιβλιοθηκονομικών Κοινοπραξιών (ICOLC)

## Licensing principles for electronic resources,

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### *Abstract*

Copyright law provisions have traditionally protected reproduction of materials for the purposes of research and teaching in universities and libraries through library exceptions and the fair use provisions. Technological developments, however, have introduced yet easier ways for reproducing information, making the owners of copyrightable material more sensitive to reproduction technologies. There is a fervor of activity at the international level, through international treaties and

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European Union directives, calling for higher levels of protection of intellectual property rights, some of which may be creating new intellectual property rights. Licensing of information resources, either by individual libraries or through consortial arrangements, has emerged as a new form of purchasing access to information resources, oftentimes aiming at circumventing the fair use and library provisions that copyright legislation has traditionally offered. Library associations in the US have drafted a set of principles that librarians should consider when entering licensing negotiations. I will briefly examine these licensing principles and discuss the actions that library organizations such as the Association of Research Libraries (ARL), the American Library Association (ALA), and other organizations, as well as, the International Coalition of Library Consortia (ICOLC) have taken.

**KEYWORDS:** academic libraries, international treaties, copyright, intellectual property, licensing, library associations, Association of Research Libraries (ARL), International Coalition of Library Consortia (ICOLC)

## *1. Introduction*

This presentation is an outgrowth of the author's experience working for the Association of Research Libraries. It can be considered as a continuation of a presentation given on "Intellectual Property Rights in the Electronic Era" at the Technological Educational Institute of Thessaloniki in May 1998. The material presented in this article draws from the two-day ARL workshop series on "Licensing Review and Negotiation."

## *2. Copyright*

Copyright law protects a variety of intellectual products ranging from literary and musical works to art, sculpture, photographs, audiovisual works, motion pictures, videos, video games, and computer software. Copyright protects the *expression* of an idea to encourage creativity and to protect the integrity of an intellectual product. Copyright *does not protect* the idea or the concept behind the expression. Thus, factual information, including database content, lists showing no originality, and public domain information are not copyrightable.

Copyright traditionally protects the following five rights and gives to the copyright owner monopoly power over his/her intellectual property:

- (a) right to reproduce (make one or more copies). Exemptions: Libraries, archives.
- (b) prepare derivative works including abstracts, translations, revisions.
- (c) right to distribute. Face to face instruction and religious services usually exempted.
- (d) right to display publicly. Exemptions: instruction, religious services, advertising
- (e) right to perform publicly

In the Anglo-Saxon tradition there is a well-defined exemption to the copyright monopoly known as "fair use" or "fair dealing". Fair use is the right to reproduce (and distribute on a limited basis) without permission of the copyright holder for the purposes of: (a) criticism, (b) commentary, (c) news reporting, (d) teaching-scholarship-research, and (e) home use (such as off-air video and audio taping). Whether a use falls under the fair use provisions is determined by (a) the purpose of the use (commercial or non-profit), (b) the extent of the use (the number of copies made), (c) the amount of material copied, and (d) the effect on market potential.

Copyright is good only for a specific period of time — early form so copyright protection defined that period to only 14 years or so but more recently and through the Berne Convention (1886) the term was defined as being equal to the life of the author plus 50 years. In Greece the copyright term is set by law 2121/1993 to be equal to the life of the author plus 70 years. The general principle being that at least the immediate descendants of the copyright owner should benefit from the fruits of his/her labor.

### 3. *Regulatory environment*

With the widespread use of technology, computers and the Internet, copyright monopolies have been threatened by the ease by which information can reproduced, changed, distributed, and made available to a wide public. Interests ranging from commercial publishers to the film industry have pushed for (a) tighter copyright protections and for (b) new protections covering the effort and investment made by a creator beyond and above just the *expression of ideas*...

Tighter copyright protections are being introduced through new legal initiatives in the interests of harmonization of global markets. Thus, the European Union (EU) has already introduced a draft directive on copyright that extends the term of copyright to life of the author plus 75 years, deciding to follow the most conservative practice among EU members (namely Germany). In the US, there is pending legislation that would extend the copyright term from life of the author plus 50 years to life of the author plus 75 years in the name of harmonizing US and EU copyright term protection.

But in addition to lengthening existing copyright protections, new kinds of protections are being introduced, an example of which is the EU database directive, World Intellectual Property Organization (WIPO) database regulations, and pending US legislation through the "Digital Millennium Copyright Act" (H.R. 2281 and S. 2037, Title V). These new regulatory frameworks create a new form of intellectual property protection for databases that is outside the scope of copyright law. Whereas protection for databases under copyright law is based on the creative organization or selection of a collection through "database" regulations protection would be based on investment. Protection is extended to facts and could be perpetual thus depleting the public domain over time. Although some narrow form of protection may be necessary to address concerns of producers of databases, these new regulations are far reaching in scope and could have significant and deleterious effects on science, research, and education. Databases are automatically protected as soon as they are created (*sui genesis*), irrespective of the amount of creativity, and the amount of information they contain that is public domain. Transformative uses, such as abstracting a database or combining some of the data from one collection with information from other sources to create a new and useful database, could trigger liability. And, these regulations often permit perpetual protection of some collections of information or in effect creating monopoly control in certain areas. For example, it would be almost impossible for someone to compete with a new product if the publisher is the original producer of information such as the New York Stock Exchange or going back in time for gathering certain historical data.

Copyright law should try to strike a balance between the right of the copyright owners and users. Preserving the delicate balance of copyright law into the digital environment is the only way to ensure continued cre-

ativity and productivity on the one hand, and the wider possible dissemination and distribution of social benefits on the other hand.

#### 4. Licenses

Given the uncertainty over the regulatory environment and the anxiety that new technologies are introducing, licenses are emerging as a new form of making information available to library users. The information license is covered by contract law, copyright law, international treaties and other newly emerging forms of regulation and it gives to the publisher and the library the ability to tailor access conditions to their specific needs.

What is a license? It is an agreement between one party who owns or controls property ("owner/copyright holder/licensor") and another party who wants rights to use the property ("user/licensee"). In the process of agreeing what rights the owner will grant, under what conditions and what obligations and/or payment are expected in return from the user, the parties are entering into a relationship based on mutual agreement, governed by *contract law*. There are five basic components in the process of signing a license: (a) offer, (b) acceptance, (c) consideration, (d) mutuality ("meeting of the minds") and (e) enforceability.

Under copyright law libraries are enjoying special rights that set limits on the monopoly power of copyright owners. As libraries are increasingly providing access to information by signing licensing agreements for electronic resources, they need to make sure that they do not abdicate well-established rights under copyright law. After all, library exceptions, such as reproduction and fair use provisions, have been established to protect the rights of library users and when libraries sign licenses they need to make sure that they are indeed serving their users rights in a professional and effective way.

That is not to say that user rights are the same under copyright and contract law. There are fundamental differences that libraries need to be aware of and work with them. A number of library organizations have drafted principles that are meant to provide guidance to library staff in working with others in the institution and with licensors to create agreements that respect the rights and obligations of both parties'. Here are

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<sup>1</sup>LIBLICENSE: <http://www.library.yale.edu/~llicense/index.shtml>

a couple of highlights from the principles that six library associations have jointly adopted - the complete list of principles is attached in an Appendix:

"A license agreement should not require the use of an authentication system that is a barrier to access by authorized users". While in the print environment every library patron has the right to use the material, in the electronic contract based environment only the user group as defined in the license has that right. This can create special problems to distance users, particularly those registered through distance education programs or to special categories of users such as visiting scholars. Access conditions can create interesting paradoxes — for example, while a professor at Aristotle University may have the right to use the resources available through the campus network, these resources may not be available to him/her when they dial in from home or are visiting another institution.

"A license agreement should recognize and not restrict or abrogate the rights of the licensee or its user community permitted under copyright law. The licensee should make clear to the licensor those uses critical to its particular users including, but not limited to, printing, downloading, and copying." For example, while in the print environment a library can loan material through interlibrary loan, this is not necessarily the case under the license agreements. We have seen lately at least one publisher, Elsevier, that has been willing to change their "no interlibrary loan" clauses in their licensing agreements, permitting the use of interlibrary loan of electronic resources.

It is probable that publishers are still grappling with the kinds of access conditions and terms for their electronic products and they are oftentimes open to negotiating mutually agreeable conditions of use. So, librarians need to be open to the possibility of negotiating licenses in better meeting their users' needs and through the process of negotiation develop a better understanding of each others' positions. One might go as far as saying that despite the hard-fought battles over copyright legislation that have deeply divided librarians and publishers, the process of license negotiation is gradually bringing them closer to understanding each others principles and needs.

Also, the process of license negotiation has brought librarians closer to lawyers. It is of paramount importance that the final contract be reviewed by the university' legal counsel. It is also important that uni-

versity legal counsel develops inhouse expertise in the issues surrounding information licenses and the production of scholarly works, patents and information. In the process of negotiating licenses, it is also important to consult with representatives of the user community, faculty, students, etc. to make sure that their needs are truly served. The ARL workshop on "License Review and Negotiation" has a subtitle "Building a Team-Based Institutional Process" in recognition that librarians by themselves should not be the only ones involved in these negotiations but rather all affected parties of the university community should be involved at some point. After all, the license is a contract that needs to be enforced by the institution itself and all its members as they are all responsible for keeping the legal commitments.

Once the license has been signed and the product is available to the users, the need for informing all users about the appropriate use of the electronic resources arises. The user needs to know:

- What is an authorized use and what is not
- who is an authorized user and who is not
- Confidentiality obligations
- Other requirements such as publication review
- Term of the license and termination requirements
- Password requirements
- Human subjects prohibitions

The user community can be informed by: (a) instituting policies that ascertain adherence to copyright, (b) formal education through workshops, guest lecturers, web resources, etc., (c) using technology such as required "read me's", password certification, etc., (d) by using written notices such as formal letters to the department chairs, posting notices over the machines, etc.

## *5. Conclusion*

There are at least six library related organizations that have currently drafted principles about licensing electronic resources and there are links available through the LIBLICENSE web page. Action is taken in informing and educating librarians through specially held workshops such like the ones organized by ARL but even close to home — currently



there is one taking place in Rome focusing on the work done by the European Copyright User Platform (ECUP)<sup>2</sup>.

The debate is between the interests of copyright owners and authors/creators on the one hand and copyright consumers and readers/users on the other. Libraries are serving the public good and are currently fighting hard for the rights of the user community. And, what could libraries and librarians in Greece do to protect their users' rights:

- develop policies regarding the use of information resources
- negotiate licenses and stand for the user community rights
- educate users about their rights and responsibilities
- stay informed and abreast of developments
- take collective action at the national and the EU level to influence the proposed laws and regulations
- protect library exceptions and special privileges by safeguarding "fair use" principles.

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 International Coalition of Library Consortia (ICOLC):  
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 Copyright Office: <http://cweb.loc.gov/copyright/> World Bank and  
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<sup>2</sup>ELECTRONIC COPYRIGHT AND DIGITAL LICENSING: WHERE ARE THE PITFALLS? INTERNATIONAL CONFERENCE AND WORKSHOP organized by AIB/EBLIDA/ECUP+ in collaboration with the ICCU (Central Institut for Union Catalogue) and the OPIB (Italian National Focal Point) 5-6 November 1998, Rome, Italy

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